TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~141.~~ 724

THE MERCHANTS' MUTUAL INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS BARING, K. D. HODYSON, J. S. HODYSON, E. C. BARING, RUSSELL STURGIS, H. B. MILDWAY, W'M MOORE, CHA'S L. NORMAN, JA'S PRICE, AND THOMAS C. BARING AS BARING BROTHERS & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 26, 1872

SUPREME COURT OF THE UNITED STATES.

No. 441.

THE MERCHANTS' MUTUAL INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS BARING, K. D. HODYSON, J. S. HODYSON, E. C. BARING, RUSSELL STURGIS, H. B. MILDWAY, W'M MOORE, CHA'S L. NORMAN, JA'S PRICE, AND THOMAS C. BARING, AS BARING BROTHERS & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

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1 Circuit court of the United States for the fifth judicial circuit and district of Louisiana.

BARING BROTHERS & Co.
vs.
MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 5740.

Petition.—Filed January 6th, 1869.

To the honorable the judges of the circuit court of the United States for the fifth judicial circuit & district of Louisiana:

The petition of Thomas Baring, Kirkham Daniel Hodyson, James Stuart Hodyson, Edward Charles Baring, Russell Sturgis, Henry Bingham Mildway, William Moore, Charles Lloyd Norman, James Price, and Thomas Charles Baring, who composed the firm of Baring Bros. & Company, merchants of London, England, and all of whom are subjects of Her Majesty the Queen of the United Kingdom of Great Britain & Ireland, except Russell Sturgis, who is a citizen of the State of New York, respectfully alleges and says that the Merchants' Mutual Insurance Company, a corporation which has been duly created under the laws of Louisiana, and has its legal domicil at New Orleans, in said State, is truly indebted to your petitioners in the sum of thirty-
2 five hundred and seven ($3,507) dollars, with legal interest from the date of this demand, and all costs of suit for this.

That your petitioners, having advanced large sums of money to the master and owners of the British bark Fanny Ealer, for the purposes of her equipment and the procuration of a cargo for a voyage from Cadiz, in the kingdom of Spain, to the port of New Orleans, Louisiana, caused, through their agents, Messrs. E. J. Forstall & Sons, in the city of New Orleans, and for the protection of said advances, an application to be made to the said Merchants' Mutual Insurance Company, on the 6th of December, 1867, for an insurance on the hull of said bark Fanny Ealer, in the sum of nine thousand dollars, which said application was then accepted; and a policy for that amount was subsequently issued on the 5th of January, 1868, in favor of said "E. J. Forstall & Sons," and "all whom it may concern," conditioned according to the terms and stipulations thereof, which said policy is hereto annexed and made part of this petition.

Your petitioners further allege and say that, on the voyage from the port of Cadiz to the port of New Orleans, the said bark, though
3 well officered, manned, and equipped for the purposes of the voyage across the ocean, suffered so much from the violence of the winds and force of the sea, that the captain, in view of the safety of the lives of himself and of crew, and of the preservation of his cargo, put into the port of Saint Iago de Cuba, in the island of Cuba, for such repairs as should be found necessary to enable him to prosecute his voyage.

Your petitioners further allege that their agents, Messrs. E. J. Forstall & Sons, at once communicated the fact of the said vessel's arrival in the island of Cuba in a disabled condition, and all the facts they knew in reference thereto, to the president of the said insurance company, and that he requested them to advise their correspondents in Cuba to take whatever steps were necessary for the protection of the interest of all parties concerned, and that all expenses would be g'aranteed, which was according' done on the 9th of January, 1868.

Your petitioners further allege that, on or about the 20th January, 1868, the secretary of the said Merchants' Insurance Company called to see their agents, Messrs. Forstall & Sons, and informed them that the underwriters of said vessel had, upon consultation, concluded to
4 send a special agent to Cuba to take charge of their respective interests in the said vessel, and requested such letters of introduction to parties in Cuba as would facilitate the objects of his visit; which letters were cheerfully given and thankfully received.

Your petitioners further allege that, from the moment of his arrival in Cuba, the agent of the said insurance company and others, Capt. J. B. McConnell, took exclusive charge of the repairs of said vessel, and gave such directions therefore, and caused such work to be performed as he thought necessary, and obtained the funds therefor from your petitioners' agents in Cuba.

Your petitioners further allege that the said vessel subsequently completed her voyage at the port of New Orleans, and that an adjustment of averages was made, for costs, charges, & damages incurred on the same, by Mess. Clarke & Ivy, adjusters of averages in this city, and that in the said adjustment, your petitioners were awarded the sum of thirty-five hundred and seven dollars on the said policy of insurance, to wit, the sum of twelve hundred and eighty-two $\frac{68}{100}$ dollars on partial loss of hull, and twenty-two hundred and eighty-two $\frac{98}{100}$ dollars general average.

Your petitioner' aver an amicable demand for the settlement of
5 this true and just demand of said Merchants' Mutual Insurance Company, that the loss was incurred under the said policy of insurance, and was fairly settled by the said assesment of average, and that the said Mutual Insurance Company are liable therefor; and they charge their refusal to pay the same; wherefore they bring this suit, and respectfully pray the process of the court, that said insurance company be cited to answer this petition, and, after due process of law, upon the proof of the facts and allegations of this petition, be condemned to pay unto your petitioners the sum of three thousand five hundred and seven dollars, with legal interest from the date of this demand, & their costs of suit, and afford such general relief as shall be found to be applicable to the facts and circumstances of the case, as in duty bound, &c.

(Signed) CAMPBELL, SPOFFORD & CAMPBELL,
Att'ys for Plaintiffs.

Verdict of the jury written on the foregoing petition.

We, the jury, find a verdict in favor of plaintiffs for amount claim', without interest.

H. REGGIO, *Foreman.*

N. O., *March 21st*, 1872.

6 *Policy of insurance.—Filed January 22d*, 1869.

The Merchants' Mutual Insurance Company, by this policy of insurance, do make insurance and cause to be insured, Ed. J. Forstall & Sons, on account of whom it may concern, lost or not lost, in the sum of nine thousand dollars, at and from Cadiz to New Orleans, of the good Brit. bark called the Fanny Ealer, whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever name or names the said vessel or master thereof is or

shall be named or called. Each passage subject to its own average. If on a passage at the expiration of the term, with the liberty to renew for not exceeding three months, at the same rate of premium, if applied for on or before the end of the term. The risk to cease twenty-four hours after her arrival at her then port of destination and to return pro-rata premium for each month not commenced, no loss being claimed. Beginning the adventure upon said vessel, tackle, apparel, &c., at and from as aforesaid and so shall continue and endure until said vessel be safely arrived at as aforesaid, and until she be moored twenty-four hours in good safety. And it shall and may be lawful for the said vessel in her voyage to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged, by stress of weather or other unavoidable accident, without prejudice to this insurance.

7 The said vessel, tackle, &c., hereby insured, are valued at twenty-two thousand dollars without any further account to be given by the assured to the assurers, or any of them, for the same.

Vessel.
No. 2514.
Sum insured, $9,000.
Valued at $22,000, including premium.
Rate, 2 per cent.
Premium . . . $180
Policy . . . .
$180

Touching the adventures and perils which the insurers are contented to bear and take upon themselves in this voyage, they are of the seas, jettisons, fires, enemies, men-of-war, pirates overpowering, but not other thieves, restraints and detainments of all kings, princes, or people, or what nation or quality soever, barratry (except embezzlement or theft) of the master, unless the insured be an owner of the vessel and of mariners, and all other losses to which the insurers are liable by this contract. And in case of any loss or misfortune resulting from any peril insured against, the parties insured engages for his or their factors, servants, and assigns to sue, labor, travel for, and use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured, or any part thereof to the charges whereof the said company engages to contribute in proportion as the sum insured bears to the whole sum at risk. And the facts of the insured, or insurers, or their agents, in preserving, securing, or saving the property insured, in case of danger or disaster, shall not be considered or held to be a waiver or acceptance of an abandonment; the company having been paid or

8 promised to be paid the consideration to this assurance by the assured, or his or their assigns, at and after the rate of two per cent.

It is also agreed that the insurers shall not be answerable for any expense, damage or lost which may arise in consequence of seizure or detention, for or on account of any trade charged with being illicit or prohibited, or any trade in articles contraband of war, whether carried on by the master, mariners, or any other persons, barratrously or otherwise, unless the insured shall show that the trade charged so to be was not illicit or prohibited. The insurers shall not be answerable for damages to other vessels or property, in consequence of collision or running foul, nor for any general average or expenses on account of such damage. And it is also agreed, in case of capture, arrest or restraint, that the insured shall not abandon therefor, until proof to the insurers, of condemnation or the continuance of the capture, arrest or restraint, for at least ninety days. The insurers take no risk of embargo or blockade, but in case of the blockade of a port of destination, the vessel may proceed to another port not blockaded, and wait for the blockade to be raised, or there end the passage; and in case of an embargo or blockade, reasonable time,

not exceeding six months; at the end of which, this insurance shall
9 cease. The company shall not be liable for wages and provisions in case of capture, arrest, blockade, embargo, or restraint. And in case of a total loss, with salvage, the amount allowed out of the savings to the officers and crew, for wages earned and services rendered previous to the loss, shall be considered as so much of the salvage applied to the use of the owners, even although the same shall be allowed or paid under the name of salvage, and not as wages, and shall accordingly be deducted in adjusting the loss. And it is further agreed that, in case a total loss be claimed, for or on account of any damage or charge to the said vessel, the only basis of ascertaining her value shall be her valuation in this policy. It is also agreed that, in case of loss or damage, the repairing and replacing of loss and damage shall only be estimated or charged against the insurers, after excluding all losses or damages requiring to be repaired or replaced in consequence, in whole or in part, of wear and tear, or natural decay. The proceeds of all articles, replaced at the charge of the insurers, shall be deducted from the net loss, after the usual allowance of new for old; and instead of deducting one-third from the cost of copper there shall be deducted two and one-half per cent. of the net cost of recoppering, after deducting
10 the value of the old copper and nails, for each and every month the copper shall have been on the vessel, when the copper shall be replaced; and if the copper shall have been on forty months or more, the costs of recoppering shall be wholly excluded; the new copper to be of the same weight as the old. And it is also agreed that if the said vessel, upon a regular survey, should be declared unseaworthy or incapable of prosecuting her voyage, and unsoundness or rottonness shall appear on the survey, or by other testimony, to be a principal cause thereof, then the assurers shall not be bound to pay any loss on this policy. And in case of stranding without the breaking up of the vessel, no abandonnement shall be made until after thirty days from its occurrence, and notice thereof to the insurers; nor unless the right to abandon shall then exist.

In case of general average, if the vessel insured is valued in the statement thereof beyond the amount hereby insured, the insurers are to pay such part only of the sum assured as the amounts insured bears to such valuation. And in case of loss, such loss to be paid in sixty days after proof of loss and proof of interest in the said vessel, (the amount of the note given for the premium, if unpaid, and all sums owing to
11 this company by the said assured being first deducted.) No loss except general average shall in any case be paid, unless amounting to ten per cent., after deducting proceeds of savings, if any, and exclusive of all charges of ascertaining and proving the loss.

And it is hereby further agreed, that if the insured shall have made any other insurance against all or any of the risks hereby insured upon the vessel aforesaid prior to this policy, then the said insurance company shall be answerable only for so much as the amount of such prior insurance may be deficient towards covering the property at risk; and the said insurance company shall return the premium upon so much of the sum by them insured as they shall be exonerated from by such prior insurance. And in case of any insurance upon said vessel subsequent to this policy, the said insurance company shall, nevertheless, be answerable to the full extent of the sum by them herein insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent insurance had been made. Policies

made the same day are to be deemed simultaneous; but this company then assumes only its proportion of the loss to be made good by
12 the insurers as the sum insured in this policy bears to the aggregate sum at risk. If the voyage aforesaid shall have been begun, and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage. In all cases of return-premium on short interest, one-tenth part of the premium thereon is to be retained by the assurers.

It is also agreed that this policy shall be void in case of its being assigned, transferred, or pledge', without the previous consent, in writing, of the insurers.

Warranted by the assured not to carry lime, and not to carry, at any one time, more than one-half of her registered tonnage of grain in sacks or bulk.

Also warranted against any desertion, temporary or otherwise, of the vessel by master, officers, or mariners on the western co'st of America, or in any of its bays, ports, or places, and against losses proceeding directly or indirectly from such desertion.

Warranted by the assured not to use port or ports in eastern Mexico, Texas, nor Yucatan, nor anchorage thereof, during the con-
13 tinuance of this insurance, nor ports in West India Islands, between July 15th and October 15th, nor ports on the northeast coast of Great Britain, beyond the Thames, nor ports on the continent of Europe, north of Antwerp, between November 1st and March 1st.

Warranted not to load with coal, lead, marble, iron, or guano, exceeding register tonnage, but liberty may be given to load beyond their tonnage of said articles, by paying additional premium therefor, as may be agreed upon.

Warranted by the assured, free from all claims for loss or damage, arising from or growing out of the collision of foreign powers, or of our Government with others.

Claims under this policy are payable in the common currency existing at the time of payment, at sixty days from date of adjustment thereof.

Warranted by the assured, free from any claim for a constructive total loss, unless the sum for which the insurers would be liable, under an adjustment of a particular average loss, made in conformity with the terms and conditions of this insurance, shall exceed fifty per cent. of the whole value of the vessel, as agreed upon this policy.

Warranted by the assured that no other insurance now exists,
14 or shall hereafter be effected on said vessel for this voyage, either by themselves or others, except nine thousand more in the New Orleans Mutual Insurance Company. Application made on 6th December, 1867.

In witness whereof the said Merchants' Mutual Insurance Company have cause' these presents to be signed by their president and attested by their secretary, at their office, in the city of New Orleans.

Attest.

New Orleans, 4th day of January, 1868.

(Signed) JOHN PEMBERTON, *President.*
P. FOURCHY, *Secretary.*

[Fifty-cents United States internal-revenue stamp affixed & cancelled.]

Citation.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

BARING BROTHERS & Co.
vs.
MERCHANTS' MUTUAL INSURANCE COMP'Y. } No. 5740.

You are hereby commanded to summon The Merchants' Mutual
15 Insurance Company, a corporation duly created under the laws of the State of Louisiana, to comply with the demand of the firm of Baring Brothers & Co., all of the members thereof being subjects of the Queen of the United Kingdom of Great Britain and Ireland, except Russell Sturgis, who is a citizen of the State of New York, contained in the petition of , of which a copy accompanies this citation, or to deliver its answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against it by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held. And that you make due return hereof on the first Monday of February, 1869.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 6th day of January, A. D. one thousand eight hundred and sixty-nine, and of the Independence of the United States of America the 93d year.

[SEAL.] (Signed) D. URBAN, *Clerk.*
(") By F. B. VINOT,
D'y-Clerk.

16 *Marshal's return.*

Received, Jan. 6th, 1869, by the U. S. marshal, and, on same day of January, 1869, served a copy of within citation—plaintiff's petition accompanying—on Merchants' Mutual Insurance Company, defendants named herein, in hands of E. Fourchy, president of said company, personally, at office of said company, No. 104 Canal st., in this city.

New Orleans, January 7th, 1869.

(Signed) S. W. REED,
U. S. D'y-Marshal.

Answer.—Filed January 18th, 1869.

United States circuit court.

BARING BROTHERS & Co.
vs.
MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 5740.

The defendant denies all and singular the allegations contained in the plaintiff's petition, and further specially avers that the insured have no right of recourse on the policy issued on the British bark Fanny Ealer, because, at the date of her departure from the city of New Orleans, and on her way to Europe, and on her return to

17 this port, the said bark was unseaworthy, contrary to the stipulations of said policy, and in violation of its express and implied warranties of seaworthiness.

Wherefore respondent prays that plaintiffs' demand be rejected, with costs; for general relief; and as, in duty, bound, &c.

(Signed) A. & M. VOORHIES, *Att'ys.*

Stipulation waiving trial by a jury.—Filed June 19th, 1871.

BARING BROTHERS & Co.
vs.
MERCHANTS' INSURANCE CO. OF NEW ORLEANS. } No. 5740.

In the circuit court of the United States, district of Louisiana.

We agree to submit this cause to the court, waiving a jury for decision upon the evidence in the cause.

(Signed) J. A. CAMPBELL,
Pl'ff's' Att'y.

(") A. VOORHIES, *Att'y.*

Hearing & submission of cause.—Extract from the minutes, June 19th 1871.

April term, 1871.

NEW ORLEANS, *Monday, June 19th*, 1871.

Court met pursuant to adjournment.

18 Present, Hon. E. H. Durell, district judge.

BARING BROTHERS & Co.
vs.
MERCHANTS' MUTUAL INSURANCE COMP'Y. } No. 5740.

This cause came up for trial before the court, the counsel having filed a stipulative waiving a trial by jury.

J. A. CAMPBELL,
For Pl'ffs.
A. VOORHIES,
For Def't.

When, after hearing the pleadings, evidence, and counsel, the court took time to advise.

Order: Cause re-instated, and to be tried by a jury.—Extract from the minutes, Dec. 8th, 1871.

BARING BROTHERS & Co.
vs.
MERCHANTS' MUTUAL INSURANCE COMP'Y. } No. 5740.

For reasons orally assigned, it is ordered that the cause be re-instated & tried by a jury.

Hearing & continuance of cause.—Extract from the minutes, March 20th, 1872.

BARING BROTHERS & CO.
vs.
MERCHANTS' MUTUAL INSURANCE COMP'Y. } No. 5740.

19 This cause came up for trial—J. A. Campbell, for pl'ffs; A. Voorhies & Randall Hunt, for def'ts—when the following jurors were called and sworn to try the issue:

1. H. ST. AMAND.
2. O. H. KARSTENDICK.
3. J. A. PEYCHAUD.
4. J. FORSTER.
5. J. R. GAUCHE.
6. W. S. LACOUR.
7. H. REGGIO.
8. M. HEMMERER.
9. VICTOR PRADOS.
10. E. DUPRÉ.
11. E. J. BRUNETTE.
12. CHA'S GAILLARD.

And the panel being complete, the trial proceeded; and, after hearing the pleadings & evidence, the cause is continued till to-morrow, at 11 a. m.

Verdict and judgment.—Extract from the minutes, March 21st, 1872.

BARING BROTHERS & CO.
vs.
MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 5740.

This cause was resumed, and, after hearing further evidence & argument and receiving a charge from the court, H. Reggio was appointed foreman of the jury, and they retired to consider on their verdict.

At 8 p. m. they returned into court and delivered the following verdict, viz:

20 We, the jury, find a verdict in favor of plaintiffs for amount claimed, without interest.

A. REGGIO, *Foreman.*

N. O., MARCH 21ST, 1872.

Whereupon it is ordered that the same be recorded.

By reason of the verdict and in accordance therewith, it is ordered, adjudged, and decreed that Baring Brothers & Co. do have and recover from the defendant, The Merchants' Mutual Insurance Company, of New Orleans, a corporation created under the laws of the State of Louisiana, the sum of thirty-five hundred & seven dollars, and costs of suit.

Bill of exceptions.—Filed March 21st, 1872.

BARING BRO'S
vs.
MERCHANTS' MUTUAL INSURANCE COMP. } No. 5740.

Be it remembered that, on the trial of this cause, the defendants, through their counsel, asked the court to charge the jury as follows: That if the evidence shows that plaintiffs' insurable interest was

21 a bottomry bond on the Fanny Ealer, and that the said vessel arrived in species at the port of destination, (New Orleans,) the jury should find for defendants.

The court refused to give the said charge to the jury, whereupon the defendants took this their bill of exceptions to the refusal of the court, and the same was signed in open court this 21st day of March, 1872.

(Signed) E. H. DURELL.

Copy served on pl'ffs' counsel.

(Signed) A. VOORHIES, *Att'y.*

Bill of exceptions.—Filed March 21, 1872.

BARING BRO'S
vs.
MERCHANTS' MUTUAL INSURANCE COMP'Y. } No. 5740.

Be it known that, on the trial of this cause, the defendants, through their counsel, asked the court to charge the jury:

"That it is only when the vessel insured is lost that the assured on a bottomry bond can recover; and that if the proof is that there were no loss or destruction of the Fanny Ealer, the jury should find for the defendants, if the plaintiffs had insured on a bottomery bond."

22 The court refused to give the said charge to the jury, whereupon the defendants took this their bill of exception to the refusal of the court, and the same was duly signed this 21st day of March, 1872, in open court.

(Signed) E. H. DURELL, *Judge.*

Copy served on pl'ffs' counsel.

(Signed) A. VOORHIES, *Att'y.*

Bill of exceptions.—Filed March 21, 1872.

BARING BRO'S
vs.
MERCHANTS' MUTUAL INSURANCE COMP'Y. } No. 5740.

Be it remembered that, on the trial of this cause, the defendants, through their counsel, asked the court to charge the jury:

"That the defendants were not bound to tender back the premiums of insurance before availing themselves of any defence against the validity of the policy of insurance or for its avoidance by subsequent cause."

The court refused to give said charge to the jury; whereupon the defendants took this their bill of exceptions to the refusal of the court; and the same was duly signed this 21st day of March, A. D. 1872, in open court.

(Signed) E. H. DURELL, *Judge.*

23 Copy served on pl'ffs' counsel.

(Signed) A. VOORHIES, *Att'y.*

Rule for a new trial filed & extract from the minutes, March 23d, 1872.

BARING BRO'S
vs.
MERCHANTS' MUTUAL INSURANCE COMP. } No. 5740.

On motion of defendants—A. Voorhies, counsel—suggesting that the verdict of the jury is contrary to the law & evidence, that the court refused to give to the jury the charges which are specially reserved by bill of exceptions and made a part hereof:

Ordered that the plaintiff show cause, on the first day of April, 1872, why the verdict should not be set aside and a new trial ordered.

Order: Rule for a new trial discharged.—Extract from the minutes, April 1st, 1872.

BARING BRO'S
vs.
MERCHANTS' MUTUAL INSURANCE COMP'Y. } No. 5740.

24 The rule for a new trial having been called and submitted by counsel without argument—

Ordered that a new trial be refused with costs.

Final judgment from judgment-docket.

Circuit court of the United States, fifth circuit and district of Louisiana.
November term.

NEW ORLEANS, *Thursday, March 21st*, 1872.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

BARING BROTHERS & CO.
vs.
MERCHANTS' MUTUAL INSURANCE COMP'Y. } No. 5740.

By reason of the verdict and in accordance therewith, it is ordered, adjudged, & decreed that Baring Brothers & Co. do have and recover from the defendant, The Merchants' Mutual Insurance Company, of New Orleans, a corporation created under the laws of the State of Louisiana, the sum of thirty-five hundred and seven dollars, and costs of suit.

Judgment rendered March 21st, 1872.
Judgment signed April 2d, 1872.
(Signed) E. H. DURELL, *Judge.*

25 *Petition & order thereon for a writ of error.—Filed April 5th*, 1872.

BARING BRO'S
vs.
MERCHANTS' MUTUAL INSURANCE CO. } No. 5740.

To the Hon. Judge E. H. Durell, sitting in the circuit court at New Orleans:

The petition of Merchants' Mutual Insurance Company of New Orleans respectfully represents:

That, on the 21st day of March, 1872, upon verdict rendered by the jury for the sum of thirty-five hundred and seven dollars, without interest, the court accordingly entered judgment for said sum with costs of suit.

That motion for a new trial was made alleging divers errors of law and facts to the petitioner's detriment; but the same was overruled and judgment made final and signed on the 2d of April, 1872. That petitioners conceive that there is error in said judgment, that they are aggrieved by said judgment, and that the same has been rendered against the facts of the case & the law applicable to the same.

26 Wherefore petitioners pray for a writ of error returnable in due course of proceedings to the Supreme Court of the United States, the said writ to operate as a supercedeas, upon petitioner's furnishing bond and surety in such sum as may be fixed by this hon. court. Pray for general relief, and as in duty bound, &c.

(Signed) ALBERT VOORHIES, *Att'y.*

Order.

A writ of error to operate as a supersedeas is allowed is this case as prayed for, and according to law returnable to the Supreme Court of the United States on the first Monday of December next, the petitioners giving bond in the sum of five thousand eight hundred dollars with good and solvent security, conditioned as the law directs.

April 5th, 1872.

(Signed) E. H. DURELL, *Judge.*

Bond for writ of error.—Filed April 8th, 1872.

MERCHANTS' MUTUAL INSURANCE COMP'Y OF New Orleans, plaintiff in error,
vs.
27 BARING BROTHERS & CO., DEFENDANTS IN error. } No. 5740.

Know all men by these presents that we, Paul Fourchy, president of the Merchants' Mutual Insurance Company of New Orleans, as principal, and Jos. J. Fernandez and Charles Lafitte as sureties, are held and firmly bound unto the firm of Baring Brothers and Company in the full and just sum of five thousand eight hundred dollars, to be paid to the said Baring Brothers & Company, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this eight day of April, in the year of our Lord one thousand eight hundred & seventy-two.

Whereas, lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein Baring Brothers & Co. are plaintiffs, and the Merchants' Mutual Insurance Company of New Orleans as defendant, judgment was rendered against the said Merchants'

28 Mutual Insurance Company of New Orleans; and the said Merchants' Mutual Insurance Company of New Orleans, having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Baring Brothers & Company citing and ad-

monishing them to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Merchants' Mutual Insurance Company of New Orleans shall prosecute its writ to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) P. FOURCHY, *Pres't.* [L. S.]
" J. J. FERNANDEZ. [L. S.]
" CH'S LAFITTE. [L. S.]

Sealed and delivered in the presence of—
(Signed) ALBERT VOORHIES.

Approved.
(Signed) E. H. DURELL, *Judge.*

29 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for fifth circuit and district of Louisiana, do hereby certify that the foregoing 28 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of Baring Brothers & Co. vs. Merchants' Mutual Insurance Company of New Orleans, No. 5740 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 10 day of June, A. D. 1872.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

[5 c't int. rev. stamp.]

I, Edward H. Durell, United States judge for the district of Louisiana, do hereby certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 10 day of June, A. D. 1872.

E. H. DURELL, *Judge.*

30 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or one of you, between Thomas Baring, Kirkham Daniel Hodyson, James Stuart Hodyson, Edward Charles Baring, Russell Sturgis Henry Bingham Mildway, William Moore, Charles Lloyd Norman

James Price, and Thomas Charles Baring, who compose the firm of Baring Brothers & Company, and the Merchants' Mutual Insurance Company of New Orleans, a manifest error hath happened, to the great damage of the said Merchants' Mutual Insurance Company of New Orleans, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 5th day of April, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United States circuit court. No. 5740. Merchants' Mutual Insurance Co. of New Orleans, plaintiff in error, versus Baring Brothers & Co., defendants in error. Writ of error. Filed April 5th, 1872. F. A. Woolfley, clerk.

31 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to Thomas Baring, Kirkham Daniel Hodyson, James Stuart Hodyson, Edward Charles Baring, Russell Sturgis, Henry Bingham Mildway, William Moore, Charles Lloyd Norman, James Price, and Thomas Charles Baring, who compose the firm of Baring Brothers and Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a petition & a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein The Merchants' Mutual Insurance Company of New Orleans is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said petition & writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this ninth day of April, in the year of our Lord one thousand eight hundred and seventy-two.

E. H. DURELL, *Judge.*

32 (Indorsed:) United States circuit court. No. 5740. Merchants' Mutual Insurance Company of New Orleans, plaintiff in error, vs. Baring Brothers & Co., defendants in error. Citation.

Marshal's return.

Received Ap'l 9, '72, by the U. S. marshal, and on the 22nd day of April, 1872, served a copy hereof on Baring Brothers & Co., by handing the same to John A. Campbell, their attorney, in person, in this city.
New Orleans, May 4, 1872.

S. W. REED,
D'y U. S. Marshal.

On this 4 day of May, 1872, personally appeared before me, the subscriber, S. W. Reed, and makes oath that he served a copy of the within citation, as stated in his official return hereon.

S. W. REED,
D'y U. S. Marshal.

Sworn to & subscribed before me.

F. B. VINOT, *D'y Clk.*

(Indorsement on cover:) No. 441. The Merchants' Mutual Insurance Company, plaintiff in error, vs. Thomas Baring, K. D. Hodyson, J. S. Hodyson, E. C. Baring, Russell Sturgis, H. B. Mildway, W'm Moore, Cha's L. Norman, Ja's Price, and Tho's C. Baring, as Baring Brothers & Company. Louisiana C. C. U. S. Filed 26th October, 1875.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

The Merchants' Mutual Insurance Company, Plaintiff in Error, *vs.* Thomas Baring and others, Defendants in Error.	No. 224.

STATEMENT.

The Merchants' Mutual Insurance Company of New Orleans, on the 4th of January, 1868, issued a policy, in ordinary form, for $9,000, upon the British barque *Fanny Eder*, from Cadiz to New Orleans, to Edward J. Forstall & Sons, of New Orleans, on account of whom it may concern, upon their application of December 6, 1867.

Rec., fols. 6–14.

The plaintiffs below, composing the firm of Baring

Brothers & Co., of London, sued in the Circuit Court of the United States, for the District of Louisiana, upon this policy, declaring an interest as bottomry lenders, they "having advanced large sums of money to the master and owners of the British barque *Fanny Ealer*, for the purposes of her equipment, and the procuration of a cargo for a voyage from Cadiz, in the kingdom of Spain to the port of New Orleans, Louisiana," and having "caused, through their agents, Messrs. E. J. Forstall & Sons, in the city of New Orleans, *and for the protection of said advances*, an application to be made to the said Merchants' Mutual Insurance Company, on the 6th of December, 1867, for an insurance on the hull of the said barque *Fanny Ealer*, in the sum of nine thousand dollars, which said application was then accepted," and the policy, accordingly, actually issued as sued on, and annexed to the petition.

Rec., fols. 1–2.

The petition avers that, on the voyage, the bark, under stress of weather, put into the port of St. Jago de Cuba, for repairs, and alleges, as the plaintiffs claim under the policy, "that the said vessel subsequently *completed her voyage at the port of New Orleans*, and that an adjustment of averages was made for costs, charges and damages incurred on the same," and "that in the said adjustment, your petitioners were awarded the sum of $3,507 on the said policy of insurance; to wit, the sum of $1,282.68, *on partial loss of hull*, and $2,282.98 *general average*."

Upon this interest in the subject insured, and this occasion and form of loss, the plaintiffs below demanded a recovery for said partial loss and said general average, in said sum of $3,507, and interest.

Rec., fols. 3, 4, 5.

The defendant below put in issue, by its answer, all the allegations of the complaint, and set up the affirmative defense of unseaworthiness.

Rec., fol. 16.

The trial was had before a jury, and occupied two days, resulting in a verdict in favor of plaintiffs "for amount claimed, without interest."

Rec., fol. 20.

Bills of Exception.

I. The defendant below asked the court to charge the jury,

"That if the evidence shows that plaintiff's insurable interest was a bottomry bond on the *Fanny Ealer* and that the said vessel arrived in specie at the port of destination, New Orleans, the jury should find for defendant."

The court refused to give this charge, and the defendant excepted.

Rec., fol. 21.

II. The defendant further asked the court to charge the jury,

"That it is only when the vessel insured is lost that the assured on a bottomry bond can recover; and if the proof is that there was no loss or destruction of the *Fanny Ealer*, the jury should find for the defendant, if the plaintiff had insured on a bottomry bond."

The court refused to give this charge, and the defendant excepted.

Rec., fol. 22.

III. The defendant further asked the court to charge the jury,

"That the defendants were not bound to tender back the premiums of insurance before availing themselves of any defense against the validity of the policy of insurance, or for its avoidance for subsequent cause."

The court refused to give this charge, and the defendant excepted.

ASSIGNMENT OF ERRORS.

The only errors assignable upon the record are.

First.—Upon the bottomry interest declared by the plaintiffs below in their petition, and the loss alleged, to wit, of partial loss and general average, adjusted upon "*the completion of the voyage*," by the bark's arrival at New Orleans, the plaintiffs were not entitled to recover, and judgment should have been given for the defendant.

Second.—The defendant below was entitled to each of the several charges asked for, and set forth in the several bills of exception, and it was error, in each case, to refuse such request, for which the judgment should be reversed and a new trial ordered.

POINTS.

First.—By the peculiar traits of the contract of marine insurance, as recognized by the law of England, and of the United States, a policy may be taken out in the name of the assured, but, really for unnamed parties, and undescribed interests in the risk insured, under the formula, introduced into the policy, of "for account of whom it may concern."

In case of supposed claim for loss under such a policy, the real party may sue in his own name, and recover as if named in the policy, but subject to its appearing, in allegation and proof,

(1.) That he was the party contemplated by the

nominal assured, and that the insurance was actually effected for the plaintiff's account, and by his authority.

(2.) That such plaintiff's interest subsisted at the time of insurance, and so continued at the time of loss, as he has sued, and seeks to recover, upon it.

(3.) If such interest is special, and its valid insurance requires its special qualities to be disclosed, (without which disclosure general words of description of the risk will not cover it in its special quality), the plaintiff coming in to sue, under the clause of "whom it may concern," must stand in the same plight as if he had been named as the assured, and had omitted the necessary disclosures.

Second.—The interest of a bottomry lender, by virtue of his lien, and by virtue of his debt itself depending upon the *res* surviving the voyage, is an insurable interest to the extent of the sum loaned and the stipulated marine interest on the loan.

Such bottomry interest is insurable in that name and description, and when insured the measure of premium and proportionate risk are well understood.

As the loss of the vessel bottomried, during the voyage, carries down with it the bottomry loan, that event completes the bottomry lender's right to recover on a policy covering his risk.

By the same reason, as the arrival of the vessel bottomried at its destined port, terminates the *risk* which makes the distinguishing and insurable feature of a bottomry loan, such arrival terminates

the voyage insured, *without loss of the interest insured.*

Accordingly, it is settled in the elementary books and upon the cases, that the insurance of a bottomry lender's interest is an insurance against *actual total loss only*, and that the elements of constructive total loss, general average and partial loss do not touch *this* contract of insurance.

The bottomry lender pays a premium accommodated to this limited indemnity of the contract, and the law executes the particular designs of the parties to the contract, no less than it upholds the logic of the relation of the bottomry lender's interest to the risk insured.

For the nature and incidents of bottomry loans, see

Abbott on Shipping, pp. (Marg.) 150 to 164 and notes.
1 Parsons' Mar. Law, pp. 406, &c.

For the general doctrines of marine insurance applicable to insurance of the bottomry lender's interest, see

1 Arnould Ins., pp. 206-7, 223, 243, 244.
2 Id., 1115.
1 Parsons, Ins. 208-212, 221-223.

Third.—Upon these authorities and certain leading cases, the following propositions seem to be well settled.

1. A bottomry risk must be specifically and *nominatim* described in the policy, and cannot be insured under a general policy. This rule is not technical, but rests upon the peculiar features of such insurance.

1 Arn. Ins., 223, 243, 244.
Simonds *vs.* Hodgson, 3 Barn. & Ad., 57.
6 Bingh., 114.
Glover *vs.* Black, 3 Burr., 1394.
1 Wm. Black, 399, 405, 422.
Williams *vs.* Smith, 2 Caines' Rep., 19.
Robertson *vs.* American Insurance Co., 2 Johns. Cas., 250.

2. Upon an insurance of the bottomry lender's interest, there is neither constructive total loss, nor partial nor general average loss.

If the bottom arrives *in specie*, the risk which the bottomry lender ran is at an end, and his debt is due and enforceable.

Were it otherwise, the bottomry lender could collect his debt from the insurer and then enforce it upon the *res* which had arrived and was subject to his bond.

Lord Tenterden says:

"A total loss within the meaning of a bottomry bond cannot happen if the ship exists in specie, although it be so much injured in the voyage as not to be worth repairing and bringing to the ultimate place of destination, so as to constitute a total loss within the meaning of a policy of insurance on the ship."

Abb. Sh., p. 151.

Arnould says:

"The doctrine of constructive total loss is not applicable to contracts of bottomry, nor to policies effected on bottomry loans. If the ship exist in specie, though in a state that would warrant an assured on ship to abandon, as

where the cost of repairs would greatly exceed her value when repaired, the assured on bottomry cannot recover; for the ship must be absolutely and totally destroyed in order to discharge the borrower."

2 Arn. Ins., 1115.

Kent says:

"The risk on a bottomry policy is peculiar. There is neither average nor salvage; and capture does not mean a temporary taking merely, but one that occasions a total loss."

Robertson *vs.* Am. Ins. Co., 2 John. Cas., 252.

Lord Ellenborough says:

"In the latter case" (insurance on a bottomry interest), "as nothing short of an actual total loss will discharge the borrower of money upon bottomry, so nothing less will render the insurer liable."

Thomson *vs.* Roy. Exch. Ass. Co., 1 Maule and Selw., 30.

Judge Story says:

"The doctrine already suggested, that in cases of bottomry, nothing but an actual total loss of the ship in the voyage will excuse the borrower from payment, not even when, by reason of the enumerated perils, the ship shall require repairs greater than her value, is fully borne out by authority."

Pope *vs.* Nickerson, 3 Story, 489.

See, also, 1 Parsons' Ins., 221–223.

Fourth.—*Upon the face of the plaintiffs' petition*, then, it appears either that the plaintiffs had no insurable interest, or that such interest was that of bottomry lenders.

It appears, also, that the policy covered, at the best, merely *this* interest, the doubt being whether for want of specification of this peculiar interest it was covered at all.

It appears, also, that the vessel completed her voyage and reached her destined port, and that the loss claimed was for partial loss and for general average loss only.

Upon the principles and authorities above cited, notwithstanding the verdict, judgment should have been given for the defendant below, and for this *error*, manifest on the record itself, the judgment should be reversed, and judgment ordered for the defendant below.

Fifth.—But, assuming that the plaintiffs below proved a bottomry interest, in support of the allegations of the petition, the defendant below was, manifestly, entitled to the instructions asked for, and for the refusal of which the first and second exceptions were taken.

If the plaintiffs below did *not* prove a bottomry interest, they proved no insurable interest. A *mere lender of money*, without admiralty hypothecation or common law lien, certainly has no insurable interest in his debtor's property.

But, as we have abundantly seen, a bottomry lender has no insurable interest except against total loss, and cannot recover upon any other loss.

For these *errors*, the judgment should be reversed and a new trial ordered.

Sixth.—The defendant below was entitled to the charge in respect to return of premium asked for and refused.

It certainly is not necessary for an insurer to return the premium before he can defend a suit on the policy, whether the defense is for breach of warranty of seaworthiness, or whatever defense that may reach to a denial of the existence of the contract.

Certain defenses may, when successful, entitle the assured to recover back the premium paid for the contract which fails. But the insurer is not bound to return the premium as a condition of the right to defeat the contract.

To refuse, then, the charge thus asked was manifest *error*. For aught that appears, the whole verdict may have been given on the issue of seaworthiness, or of the bottomry interest, upon the jury's requirement of a return of the premium by the insurers, before they could be let into these defenses.

For this *error*, also, the judgment below should be reversed and a new trial ordered.

Last.—The judgment below should be reversed, with costs.

Wm. M. Evarts,
Of Counsel for Plff. in Error.

UNITED STATES SUPREME COURT.

MERCHANTS INSURANCE COMPANY,

PLAINTIFFS IN ERROR,

VERSUS

BARING BROTHERS & CO., DEFENDANTS.

STATEMENT OF THE PLEADINGS.

Baring Bros. & Co. recovered in the Circuit Court of the United States, at New Orleans, against the Insurance Company aforesaid, upon a policy of insurance taken by their agents at New Orleans, upon the British bark Fanny Ealer upon a voyage from Cadiz, in Spain, to the city of New Orleans. Their petition represents that they had advanced large sums of money for the purpose of the equipment of the bark and a procuration of a cargo for the voyage, and for the protection of these advances the policy was made.

They allege that the voyage was prosecuted, and during its continuance there was a necessity arising from the violence of the winds and the force of the

waves of the sea for the bark to put in to the port of St. Jago de Cuba for repairs,

That notice was given to the underwriters, and that they appointed an agent to proceed to St. Jago de Cuba, who took exclusive possession of the vessel and ordered the repairs, and was furnished with money by the agents of the plaintiffs so that the vessel was enabled to complete her voyage, and come to New Orleans. That after her arrival at New Orleans, the average account was adjusted by the adjuster of average, and the amount of the contributing share of the plaintiffs ascertained.

That this amount was due, that the loss arose under the policy of insurance, and payment had not been made after an amicable demand. Rec. 1, 2, 3, 4.

The Insurance Company answered a general denial and specially, that the Fanny Ealer was not seaworthy at the time of the voyage from New Orleans to Cadiz and from Cadiz on her return to the city of New Orleans.

The cause was tried before a jury in the Circuit Court, who returned a verdict for the amount claimed without interest, and judgment was entered for the plaintiffs, Baring Bros. & Co. The defendants, The Merchants Insurance Company, sued out a writ of error to this court.

II.

The plaintiffs in the Circuit Court sued for the

amount of the adjustment, as found by the adjuster of averages. The jury returned a judgment for the amount thus ascertained. The petition shows that all of the repairs were made by an agent sent by the underwriters to St. Jago for that purpose. That he had the charge of the repairs exclusively, and that upon the termination of the voyage the respective shares were adjusted, and that the money was due according to that adjustment.

In Lapeyre vs. Thompson, 7th Louisiana Ann. R. 218, 220, the Supreme Court say: "the law of Insurance attaches great importance to an adjustment and a promise by the insurers in accordance with it. It was formerly held equivalent to a note of hand. It is still held as equivalent to a settlemeut, arbitration or compromise and concluding the parties. An action may be brought on the adjustment or an action on the policy itself—the adjustment will be evidence of the loss and its amount." Other authorities acknowledge it to be prima facie evidence. Phil. Ev. 478, M. & M., 373. 2 Parson M. In. 357.

The defendants in the Circuit Court, upon the trial of this cause, requested the court to give instructions to the jury, which have been embodied in three bills of exceptions.—Record 8, 9.

1. That if the evidence shows that the plaintiff's insurable interest was a bottomry bond on the Fanny Ealer and that said vessel arrived in species at the port

of destination (New Orleans) the jury should find the defendants.

2. That it is only when the vessel insured is lost that the assured on a bottomry bond can recover; and that if the proof is that there were *no loss* or *destruction* of the Fanny Ealer, the jury should find for the defendants, if *plaintiffs* had *insured* on a *bottomry bond.*

3. That the defendants were not bound to tender back the premiums of insurance before availing themselves of any defence *against* the *validity* of the *policy of insurance,* or for its *avoidance by subsequent cause.*

It is difficult, if not entirely impracticable, to discuss appropriately propositions like these without understanding how such questions came to arise, and what were the circumstances attending their presentation to the court. The first two are of the same import. They seem to affirm that there cannot be in any supposable case, nor in the case before the court any recovery for loss or damage to the vessel, other than a total loss if the policy be of an interest created by a bottomry bond.

But before applying any such rule for the decision of a cause in court, the bond should be exhibited and its condition examined. But no bond is set out in the proceedings and the matter of fact, whether there be a bond, and that bond a bottomry bond, is strangely submitted for an inquiry to be made by the jury.

They are asked to determine the legal effect of the proof of insurable interest. If the insurable interest were established by the production of a bottomry or other bond to the court or jury, it is obvious that it was for the court to determine whether the interest manifested by the bond was an insurable interest or not under the terms of the policy and the facts accompanying the damage to the vessel. The plaintiffs have an impression that the name bottomry bond applies to a distinct class of contracts, every individual of which has the same distinguishing features, and that one of these is that there can be no insurance except against a total loss. But this proposition is not well founded. In the French Code of Commerce the lender on bottomry is charged with all average contributions not excluded by the bond.—Code Com. 330. And Parsons in his work on Marine Insurance says, that this is commonly provided for by stipulation in this country.—1st Parson M. Ins., 221; 1 Binn, 405, and insurance may be made to secure against loss. The Civil Code of Louisiana grants a privilege on a vessel for money lent on bottomry for refitting, victualling, arming, equipping. the vessel before her departure.—C. C. 3204 § 9. The jurisprudence of Louisiana rejects the conclusion that lenders on bottomry are not chargeable with general average and disapproves the doctrine of the case of 3 Doug. 164, 2 John Ca. 250, and the text writers on this subject.

Chandler vs. Garnier, 6 Martan N. S. 599, and the

older editions of Phillips on Marine Insurance do not admit their authority.

This is a Louisiana contract. The plaintiff does not describe in his motion for instructions the features of the bond the jury are to find to authorize the favorable verdict he claims. In fact the prayer seems to imply that there was no bond at all before the jury or not such a bond as he likes to examine, or to have expounded except by the printed name on the back of it. Certainly his proper course would have been to have asked the court whether the bond produced or spoken of, did allow of a recovery except in case of a total loss and not to have asked for the opinion of the jury. The issues in this cause arise on the pleadings. The general denial does not put in issue the nature or extent or character of the plaintiffs' interest. Under the Code of Practice of this State and the jurisprudence under it there must be a traverse of the fact of interest before the plaintiff is put upon proof. The English rule that the allegations of interest must be traversed, modo et forma, is adopted in practice and several decisions have sustained the conclusion.

Arnould on Insurance, 1051.

Kathman vs. Insurance Co., 12 La. Ann. 35–38.

10 La. Ann. 809. 9 Ann. 591.

The liability of the Insurance Company may have been proved by the receipt of the premium; the action on the notice of the disaster; the sending of the

agent to take possession of the vessel for repairs; the procurement of the money for the purpose from Forstall & Co., the agents of the defendants; a submission to the adjusters of averages of the accounts and the acknowledgement of their adjustment and the failure to plead the want of interest in the property or the cargo.

It may be, there was no bottomry bond before the jury at all, but some allusion in the papers to one as the basis of the insurance. The plaintiff asks the court to instruct the jury to find whether this was the ground of the insurance. Whether a bottomry bond existed, not what the bond before court and jury did or did not justify as to a matter of insurance. Again: suppose there was a bond which placed the interest and a part of the principal in jeopardy, and placed the repairs specifically upon the assured; the bond would in common parlance be a bottomry bond and there would be a title to the loss proved.

11 Pick. 187; 4 Binn, 244.

Again: the Code of Louisiana gives a privilege on loans on bottomry aside of the hypothecation in the contract itself; also to creditors for supplies, labor, repairing, victuals, armament and equipment of the vessel, and in the case of privileges there is an insurable interest. The lender may insure that his security shall not be impaired in value.—Bell vs. M. & F. Insurance Co., 5 Rob. La. R. 424.

Though the ship arrive in safety the security may be

of no value. Parsons in his work puts this case—1 Parsons, M. Ins. 223–224. We have a right to say, our bond, if it be there was one, was precisely fitted to support the verdict and judgment. There is nothing to show to the contrary, All the presumptions are so. Intelligent merchants make the contract —the corporation cause the repairs to be made—submit to the adjusters to find the adjustment of loss. The court and jury find a liability.

Before the court will reverse a judgment there must be shown an error injurious to the party complaining. The plaintiffs were bound to show that there existed a state of facts to render the instructions prayed for proper. This prayer for instructions must be correct in its very terms, and must not be abstract, nor calculated to mislead the jury.

An examination of these instructions will convince the court that each one of the canons we have collected from the decisions of the court have been neglected by the plaintiffs in this case in the matter of these bills of exception.

III.

The third bill of exceptions is taken for a refusal to instruct the jury "That the defendant was not bound to *tender back* the premiums before availing themselves OF ANY defence against the validity of the policy of insurance, or for its avoidance by subsequent cause."

It no where appears that the plaintiffs were hindered

or that any one made an attempt to hinder them from making any defence they had to the policy of insurance, or any defence which would avoid it.

The answer and special plea are filed and no exception was taken to them. What defence was obstructed at all? What defence was obstructed because the premium received was not returned or offered to the assured. Nothing of the kind appears. The answer sets up that the vessel was not seaworthy, and the policy did not attach. If that defence had been prevented, we probably would have had an exception to the charge, overruling it. We should understand an exception to a charge of the court to the effect that the return of the premium, or an offer to return the premium, was necessary to that defence.

But there is nothing of this kind in the record. So we could deal with an exception to a refusal of the court to charge the jury that if the jury believed the vessel was not seaworthy according to the terms of the plea, they should find for the defendants. No such charge was given or refused as thus suggested.

But the charge prayed for deals with the general capacity of an insurance company. It may be put in these terms: This company has an inherent, inalienable and indefeasable right to avail itself of *any defence* against the validity of its policies of insurance, and for its avoidance for subsequent course without returning the premiums paid. Suppose we admit this as a part

of the chartered rights of this corporation, what advance do we make towards a decision in this case? The question with the court and jury is not as to the extent of the faculties of the corporation for making defences in this or in any other case. The question is, what defence have you made in this suit? Or what defence have you been hindered from making by any erroneous opinion of the court.

The defences which the corporation proposed to make appear in the answer. No objection was made to their reception. Nor is it shown that any objection was made to the employment of their faculty to make defences of any kind, whether pleaded or not pleaded, without a return or offer to return the premiums.

The court was not required to announce a universal proposition of this kind.

The plaintiff asserts two distinct universal propositions in this prayer.

1st. I am entitled to make any defence against the validity of this policy without an offer to return the premium.

2d. I am entitled to make any attempt to avoid this policy for cause arising after the issue without a return of the premium.

The question is what was the necessity for giving the jury this information? If there had been a hindrance interposed to some valid defence by reason of this failure to return the premiums then there would

have appeared some occasion for information. Nothing of the sort appears or exists. We are not prepared to admit that a court can be required to run over the imaginable cases in which the validity of a policy can be impugned or its avoidance for subsequent cause asserted so as to determine whether in any of them a return or offer to return the premiums was a precedent condition. We are not prepared to admit that some case cannot be supposed in which a failure to return or offer to return the premiums was not a necessity to its successful impeachment.

Suppose a policy issued by an agent or officer of the corporation without authority, the premium is paid to the corporation with full knowledge and it is retained and used—the defence would fail—for this. Suppose the vessel to be unseaworthy at the commencement of, or during the progress of the voyage and the fact is made known and a return of the premium requested and refused to be returned before a loss for this reason and on this statement, this failure to return or offer to return would be conclusive.

We have elaborated the discussion of these bills of exceptions rather from our impression of their extreme feebleness than from any opinion we have of their strength. We pray for affirmance with damages.

J. A. CAMPBELL,
DUNCAN G. CAMPBELL,
Defendants Attorneys.

In Supreme Court of the U. S.

MERCHANTS MUTUAL INSURANCE COMPANY
vs.
BARING, BROTHERS & COMPANY.
} No. 224.

Brief of P. PHILLIPS,

For defendants.

S. & R. O. POLKINHORN, PRINTERS, D ST. NEAR SEVENTH.

In Supreme Court of the U. S.

MERCHANTS MUTUAL INSURANCE COMPANY
vs.
BARING, BROTHERS & COMPANY.
No. 224.

Brief of P. PHILLIPS,

For defendants.

The ~~defendants~~ Plaintiffs below filed their petition in the Circuit Court for Louisiana, on a policy of insurance made in that State, averring that "they had made large advances to the master and owners of the bark Fanny Ealer, for the purpose of her equipment, and the procuration of her cargo, for a voyage from Cadiz to the port of New Orleans."

That the vessel arrived, in a damaged state, in the port of New Orleans, and that in the adjustment of average which there was had, there was awarded to the petitioners the sum of $3,507.

The petition further shows that hearing that the vessel had, in a disabled condition, put in to the Island of Cuba, the information was communicated to the president of the company, who requested that their correspondents in Cuba should do all that was needful for the protection of the interest of all concerned, and that all expenses would be guaranteed. Some days subsequent to this, the company concluded to send on their own

agent, and he took exclusive charge of the repairs, and obtained funds therefor from the agent of petitioners.

The demand was for the sum awarded by the adjuster.

The policy of insurance, made part of the case, declares that the company "do make insurance in the sum of $9,000 at and from Cadiz to New Orleans, of the good British bark called the Fanny Ealer. Each passage subject to its own average."

It further provides, that "no loss, except general average shall, in any case be paid *unless* amounting to 10 per cent." p. 4.

The only plea was one generally denying the allegations of the petition, and specifically setting up the unseaworthiness of the vessel.

The jury found for the amount claimed without interest, and judgment was rendered accordingly.

The judgment is now sought to be reversed because the judge refused to give the three charges asked by the defendant.

The two first embraced the general proposition that there could be no recovery if the interest of the plaintiff was that of bottomry, except there had been a total loss or destruction of the vessel.

It is to be observed that no question is made as to the description of the interest insured—whether being an insurance on bottomry it was necessary to be described, so nominee, or in any other manner. No charge is asked upon this, but the case is put exclusively on the ground, that however insured, a holder of bottomry could in no case recover, when the vessel arrived, in specie.

BOTTOMRY BOND.

The doctrine of Pothier—Traitè d'assurance, No. 32—

that *maritime interest*, which the lender on bottomry is to receive, on the prosperous termination of the voyage, is not the subject of marine insurance, because such interest is a *gain*, which the lender will miss making if the ship perishes, and not a loss by the perils of the sea—has neither the sanction of reason, nor the support of authority.

An insurable interest may be absolute or contingent, legal or equitable. It may exist in the assured, not only as absolute owner, but also in the character of mortgagor or mortgagee, borrower or lender, consignee, factor or agent; and may arise from profits, freight, commissions, or other lawful business.

It is sufficient, if a loss of the subject would bring upon the assured a pecuniary loss, or intercept a profit.

In this country, one who stands in the character of an insurer, has himself an insurable interest, and may reinsure.

3 Kent's Com. Marg'l., pp. 262, 276, 279.

2 Am. Lead. Cases, p. 807.

1 Marshal, p. 117.

As between the lender and the borrower, the former agrees to incur the hazard of loss, and receives the premium for this chance.

There is nothing in this agreement which should prevent the lender, who has thus staked his capital, from insuring against its loss.

In the recent publication of Mr. Parsons, he says, the bond should always describe the risk which the lender assumes, and it is against these risks that he has an insurable interest.

Whatever be the phraseology, the insurable interest in

the lender is the risk he runs of having the bond discharged by the perils which he assumes.

1 Parson's Marine Ins., p. 212.

In England, and in this country, the lender on bottomry has only the security of the thing hypothecated.

The Virgin, 8 Pet., 554.

The charges requested by defendant assume as law, that the lender can only insure against a total loss, or destruction of the thing.

It is very evident that the lender has the whole amonnt advanced at risk. He is not only interested that the vessel should arrive at the destined port, but also that she should arrive in such condition, to respond to the claim upon her.

This is a real interest in the thing.

There is no policy of law which should exclude the right to insure such an interest. It does not fall within the reason of the prohibition as to the captain's freight or the seaman's wages. These are not allowed to be insured, on the ground that shipwrecks would become too common if personal interest were not concerned in the presevation of the ship.

The reason of this rule can have no application to one who is in no wise concerned in the management or navigation of the vessel—nor can it be brought within that other rule which refuses the aid of the court to give effect to a wager.

The defendant agreed to insure a certain amount on the vessel. It received the premium on that amount and ought not to be allowed to escape from the obligation it incurred.

It is further maintained that the character or nature of the interest insured, is not put in issue by a plea de-

nying "the allegations contained in the plaintiff's petition."

In such an action as this "all matters in confession and avoidance, including not only those by way of discharge, but those also which show the transaction to be void or voidable in point of law, should be pleaded specially.

2 Arnold on Ins., Marg'l p. 1286.

And this is the established rule in Louisiana, where this contract for insurance was entered into.

Kathman Ins. Co., An., 37.

It is further to be noted that the record does not disclose that any bond was in evidence, or if there were, what was the character of that bond.

In the absence of such evidence this court cannot pass upon the exception.

There are various forms with various stipulations in such bonds. Thus, if the lender does not choose to take upon himself the risk of the ship's return, and is content not to demand maritine interest, the ship may still be hypothecated to secure such bond.

Abbott, 199.

In the case of The Virgin, (supra) this court say, the form of bottomry bonds, is different in different countries, and so is their authority.

Bottomry bonds are subject to salvage and average. See the remarks of Mr. Parks, commenting on the decision of Mansfield, supposed to decide otherwise, in the case of Appleton v. Commonwealth, 3 Mass., 465.

Chandler v. Garnier, 6 Martin N. S., 599.

3 Kent's Com., marg'l, 360.

Parsons states the doctrine thus: "There is no salvage or average unless the contract provides that the bondholder shall contribute to the general average of the

ship; and this is now common on the ground that the ship is his security. If there be such a provision, *he is himself entitled to contribution and salvage.*"

Parsons' M. I., p. 221.

All this makes it evident that in the absence of the bond, the court cannot decide whether the instructions were properly refused. The court should have been called upon to construe the written instrument, and if its construction was objected to, then the instrument itself should have been attached to the exception to enable this court properly to revise the ruling.

In the case of Buck & Hedrick v. The Chesapeake Ins. Co., the court below divided as to the propriety of the charges requested, and so the case came here on a certificate of division.

One of the charges was this: That in this insurance, which was for *whom it may concern*, the plaintiff was not bound to have disclosed that Spanish property was intended to be covered, and that in such policies there can be no undue concealment as to the parties interested.

The court remarks on this: "Dangerous as it always is in a court of justice to generalize in the propositions which it decides, it is peculiarly so in questions arising on policies of insurance. The present proposition is couched in too general terms to admit an affirmative answer without modification. And as courts of justice are not bound to modify or fashion instructions moved for so as to bring them within the rules of law, if this case had come up on writ of error for refusing the instruction as prayed for, it would be difficult to say the court was bound to give the instruction."

1 Pet., 159.

In preparing the bill of exceptions, while it is not proper to send up all the evidence in the cause, it is necessary that it should contain so much of the testimony

or such a statement of the proofs made or offered, as will show the bearing of the ruling upon the issues involved.

Lincoln v. Claffin, 7 Wall., 136.

As to the third and last exception it is only necessary to say, that the court was not bound to decide an abstract question. The defendant was not prohibited from making any defence in the case, and it was, therefore, unnecessary to call upon the court to say that it was not necssary in order to make defence, that the premium should have been tendered back.

Referring to the brief of the Messrs. Campbell, it is submitted that the judgment must be affirmed.

P. PHILLIPS,
For Defendants in Error.